Insas Bhd & Anor v David Samuels & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–47 OF 1996
KAMALANATHAN RATNAM J
20 OCTOBER 2004

Tort — Defamation — Libel — Article in magazine — Whether words complained of defamatory of and concerned plaintiff — Whether words referred to plaintiff — Whether words published to third person

Tort — Defamation — Libel — Article in magazine — Damages — Assessment

This was a libel action instituted by the plaintiffs against the defendants arising out of the publication of a feature article entitled 'Malaysian Justice On Trial' ('the said article') which was published in the November 1995 issue of the *International Commercial Litigation* magazine ('the said magazine'). The said magazine was published in London and circulated in Malaysia and elsewhere.

In their statement of claim, the plaintiffs pleaded that the natural and ordinary meanings of the words complained of in the said article were meant and were understood to mean that the plaintiffs and each of them had connived at, and participated in the corruption, or the attempted corruption by one Dato' VK Lingam of the Malaysian judiciary, in the course of the plaintiffs' litigation against Ayer Molek Rubber Company Berhad in Malaysia.

The defendants did not enter appearance to the plaintiffs' action. The plaintiffs set the matter for trial rather than entering interlocutory judgment against the defendants.

Held, allowing the plaintiffs' claim:

(1) In a defamation action, the plaintiff must prove that: (a) the words complained of were defamatory of and concerned the plaintiff; (b) the words referred to the plaintiff; and (c) the words had been published to a third person (see paras 11).

(2) In the instant case, the said article was clearly defamatory of and concerned the plaintiffs. The words complained of bore the natural and ordinary meaning pleaded by the plaintiffs, that is, the plaintiffs had connived at, and participated in the corruption or the attempted corruption by Dato' VK Lingam of the Malaysian judiciary, in the course of the plaintiffs' litigation against Ayer Molek Rubber Company Berhad (see para 27).

(3) The names of the first and second plaintiffs were clearly stated in the said article. Therefore, the second element of the identity of the plaintiffs had been established (see para 20).

(4) In proving that there was publication, the plaintiffs had submitted an original copy of the said magazine. The plaintiffs had also called several witnesses who testified that they had received and read the said article. Accordingly, the plaintiffs had proven that the words complained of were published to third parties as required by the law of defamation (see paras 14, 18).

(5) Having regard to the established principles of law applicable in the award of damages in libel actions and taking into account the grave and serious libel perpetrated by the defendants against the plaintiffs and to vindicate the plaintiffs' business and trading reputation, and bearing in mind the guideline given by the Court of Appeal not to award large and extensive awards, a sum of RM500,000 for each of the plaintiffs would be sufficient compensation (see para 47).

[**Bahasa Malaysia summary**

Ini adalah tindakan libel yang dimulakan oleh plaintif-plaintif terhadap defendan-defendan yang timbul daripada penerbitan sebuah artikel bertajuk 'Malaysian Justice On Trial' ('artikel tersebut') yang diterbitkan dalam majalah *International Commercial Litigation* keluaran November 1995 ('majalah tersebut'). Majalah tersebut telah diterbitkan di London dan diedarkan di Malaysia dan tempat lain.

Dalam pernyataan tuntutan mereka, plaintif-plaintif telah memplidkan bahawa maksud semualjadi dan biasa perkataan-perkataan yang diadukan dalam artikel tersebut bermaksud dan difahami mambawa maksud bahawa plaintif-plaintif dan setiap daripada mereka telah bersubahat, dan terlibat dalam rasuah, atau cubaan rasuah oleh Dato' VK Lingam daripada kehakiman Malaysia, semasa litigasi plaintif-pliantif terhadap Syarikat Getah Ayer Molek Berhad di Malaysia.

Defendan-defendan tidak memasuki kehadiran terhadap tindakan plaintif-plaintif. Plaintif-plaintif telah menetapkan perkara tersebut untuk perbicaraan dan tidak memasuki penghakiman interlokutori terhadap defendan-defendan.

Diputuskan, membenarkan tuntutan plaintif-plaintif:

(1) Dalam satu tindakan fitnah, plaintif perlu membuktikan bahawa: (a) perkataan-perkataan yang diadukan berunsur fitnah dan berkaitan plaintif; (b) perkataan-perkataan tersebut merujuk kepada plaintif; dan (c) perkataan-perkataan tersebut telah diterbitkan kepada orang ketiga (lihat perenggan 11).

(2) Dalam kes semasa, artikel tersebut dengan jelas berunsur fitnah dan berkaitan plaintif-plaintif. Perkataan-perkatan yang diadukan

mengandungi maksud semula jadi dan biasa yang diplidkan oleh plaintif-plaintif, iaitu, plaintif-plaintif telah bersubahat, dan terlibat dalam rasuah atau percubaan rasuah oleh Dato' VK Lingam daripada kehakiman Malaysia, semasa litigasi plaintif-plaintif terhadap Syarikat Getah Ayer Molek Berhad (lihat perenggan 27).

(3) Nama-nama plaintif pertama dan kedua dengan jelas dinyatakan dalam artikel tersebut. Oleh itu, elemen kedua berhubung pengenalan plaintif-plaintif telah dibuktikan (lihat perenggan 20).

(4) Dalam membuktikan bahawa terdapat penerbitan, plaintif-plaintif telah mengemukakan satu salinan asal majalah tersebut. Plaintif-plaintif juga telah memanggil beberapa orang saksi yang memberi keterangan bahawa mereka telah menerima dan membaca artikel tersebut. Sewajarnya, plaintif-plaintif telah membuktikan bahawa perkataan-perkataan yang diadukan telah diterbitkan kepada pihak ketiga sebagaimana dikehendaki oleh undang-undang fitnah (lihat perenggan 14, 18).

(5) Berdasarkan prinsip undang-undang tetap yang terpakai dalam award ganti rugi untuk tindakan libel dan mengambil kira libel yang berat dan serius dilakukan oleh defendan-defendan terhadap plaintif-plaintif dan untuk menjustifikasikan perniagaan dan reputasi perniagaan plaintif-plaintif, dan mengambil kira panduan yang diberikan oleh Mahkamah Rayuan untuk tidak memberi award yang besar dan melampau, sejumlah RM500,000 untuk setiap plaintif adalah pampasan yang memadai (lihat perenggan 47).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 314–434. For libel, see 5 *Halsbury's Laws of Malaysia* paras [80.110]–[80.113].

Cases referred to

Baltrop v Canadian Broadcasting Corp [1978] 86 DLR (3d) 61 (NSSC App Div) (refd)
Bonnick v Morris [2002] 3 WLR 820 (refd)
Broome v Cassell & Co [1972] AC 1027 (refd)
Cassell & Co v Broome [1972] AC 1027 (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371 (refd)
Datuk Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor [1984] 1 MLJ 97 (refd)
Dingle v Associated Newspapers Ltd & Ors [1964] AC 371 (refd)
Gillick v British Broadcasting Corporation & Anor [1996] EMLR 267 (refd)
Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833 (refd)
Jones v Skelton [1963] 3 All ER 952 (refd)

Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161 (refd)
Manning et al v Hill [1995] 126 DLR (4th) 129 (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun and other appeals [1995] 2 MLJ 493 (refd)
Rubber Improvement Ltd v Daily Telegraph Ltd [1964] AC 234 (refd)
Skuse v Granada Television Ltd [1996] EMLR 278 (refd)

V Siva (R Thayalan with him) (V Siva & Partners) for the plaintiffs.
Shubhaa holding watching brief for Raphael Pura.
Defendants not represented.

Kamalanathan Ratnam J:

[1] This is a libel action instituted by the plaintiffs against the defendants arising out of the publication of a feature article entitled 'Malaysian Justice on Trial' ('the said article') which was published in the November 1995 issue of the *International Commercial Litigation Magazine* ('the Magazine'). The magazine is published in London and circulated in Malaysia and elsewhere. Insas Bhd ('the first plaintiff') was at the material time a company listed on the Kuala Lumpur Stock Exchange. Megapolitan Nominees Sdn Bhd ('the second plaintiff') was at the material time a licensed stock broking company. The second plaintiff is the wholly owned subsidiary of the first plaintiff. David Samuels ('the first defendant') was at the material time a staff writer of the said magazine and also the writer of the said article. Joff Wild ('the second defendant') was at the material time the editor of the said magazine. Robert Menzies Walker ('the third defendant') was at the material time the editorial publisher of the said magazine. Euromoney Publications PLC ('the fourth defendant') was at the material time the proprietor and publisher of the said magazine. The defamatory words contained in the said article and complained of by the plaintiffs are set out in para 7 of the statement of claim which is as follows:

> 1 On pages 10 to 14 of the November 1995 issue of the International Commercial Litigation (hereinafter referred to as 'the Magazine'), in a feature article entitled 'Malaysian justice on trial' (which article was the cover story for that issue, and was highlighted on the front cover of the Magazine), the first defendant wrote and published, the Second, Third and the fourth defendants published, of and concerning the plaintiffs, and of and concerning them in the way of their said business and in relation to their conduct therein the following defamatory words:
>
> Feature
>
> Malaysia's reputation for judicial integrity is being questioned. David Samuels reports that a string of controversial court decisions is the cause of mounting concern among the country's lawyers and foreign investors.

Malaysian justice on trial

On 10 April 1995, a Malaysian lawyer was granted an ex parte order by the country's High Court, compelling a company to register a block of shares owned by his client. The kind of thing that happens all the time.

But this was no routine case. This was different. It ended with Malaysia's supreme court criticizing the country's appeal court in terms which were far from judicial, and the president of the Malaysian Bar Council talking of 'very serious questions over the administration of justice in Malaysia'.

The case in question was the Ayer Molek case. And it was the culmination of a series of court decisions in commercial cases which has caused many of Malaysia's leading lawyers to raise doubts about Malaysia's legal system.

'The ultimate fear about Ayer Molek and all of these cases is that they mean Malaysia is going the way of other Asian countries, such as Indonesia, Thailand and the Philippines', says Raphael Pura, the Malaysia correspondent to the Asian Wall Street Journal. 'The implication is that, just like those other countries, Malaysia is becoming a place where justice is now "up for bid".'

Until now, Malaysia, which enjoyed economic growth of 9.5% in the first half of 1995, has been able to portray itself as a country largely free from corruption. As a result, the government has succeeded in attracting some of the biggest foreign names in manufacturing. Apple Computers, Citroen, Motorola, General Electric and Hewlett Packard all chose Malaysia as their base when they set up manufacturing operations in Asia.

The court cases to which Pura refers, and which could seriously affect Malaysia's reputation as a major financial centre, have all occurred within the last year. They came to a head in August, when the Ayer Molek case provoked a row between the Federal Court and the Court of Appeal, Malaysia's two highest courts. Because of the cases, Malaysians from all walks of life have openly started to question the independence of their judiciary.

On 28 August, Puan Hendon, the president of the Malaysian Bar Council, issued a press statement saying the 'differing views and comments' of the two courts raised 'very serious questions over the administration of justice in Malaysia'. In response, Eusoff Chin, Malaysia's most senior judge and the author of the Federal Court judgment which criticized the Court of Appeal, issued a statement saying the Bar Council should have discussed the matter with him privately before they went 'to yell in the press'.

Politicians also became involved. Lim Kit Siang, secretary general to the DAP, Malaysia's largest opposition party, said that there was 'a new crisis of confidence over the judiciary in Malaysia'. Prime Minister Mahathir Mohamad told the Bar Council and Chin on 7 September that their squabble was 'destabilizing' the Malaysian legal system.

The Ayer Molek case

The case of *Insas and Megapolitan Nominees v Ayer Molek Rubber Company* concerned court action brought to force the rectification of Ayer Molek's share register after the M$157m (63m) purchase by Insas and Megapolitan, two related investment houses, of 30% of Ayer Molek's shares in 1994. It produced very sharp criticisms from the Court of Appeal about the conduct of one plaintiff lawyer, VK Lingham of VK Lingham & Co, accusing him of illicit manoeuvring to put the case before a High Court judge of his choice.

Even though they had not asked Ayer Molek to register their shares, Insas and Megapolitan went to the High Court on 10 April 1995. They informed the judge that they knew from 'reliable sources' that Ayer Molek, if asked, would refuse to register their shares. This was because the company had not registered a separate, 12% block bought by a nominee company, PFA Nominees.

Later affidavits show that Haji Mohd Halmi, the chairman of Ayer Molek, had, by the time of the court hearing, become convinced that Insas, Megapolitan, PFA Nominees and Vincent Tan, one of Malaysia's most prominent businessmen, were 'aligned to each other to ensure that both the Insas shares ... [and the PFA shares] were registered'. He believed that, by jointly buying 42% of Ayer Molek stock in secret, Insas and PFA had breached Malaysia's takeover code. Consequently, Ayer Molek's board had decided that registration requests from either Insas and Megapolitan, or PFA Nominees, would be refused.

The affidavits show that Haji's belief resulted from meetings to which he was invited on 31 March and 5 April. Tan, Thong Kok Kei, the chief executive of Insas and a close friend of Tan, and Lingam, counsel to both, were present at each. On both occassions, Haji was requested to 'speed up the registration of the PFA held Ayer Molek shares'.

In the High Court on 10 April, Lingham was granted an ex parte order designed to compel Ayer Molek to register the 30% block of shares bought by Insas and Megapolitan. Judge Azmel Mamoor, who sits in the Special Appellate Division of the High Court (which deals with administrative cases), and is the Chief Judge of the High Court, made the order. The order, which was served on 11 April, directed Ayer Molek's officers to register the shares within 48 hours or face imprisonment.

Ayer Molek applied to have the order revoked on 13 April. Azmel agreed to hear their request on 27 April but refused a request to stay the injunction pending that hearing. Ayer Molek reluctantly registered Insas's and Megapolitan's shares on 14 April and took the matter to the Court of Appeal four days later. Ayer Molek was seeking a declaration that the High Court had been unjust and asked the Court of Appeal to reverse the effects of a registration that had been made under duress. The hearing was set for 26 July.

At the hearing, the Court of Appeal, saying that it was 'using its inherent power to stop further injustice from occurring', gave Ayer Molek an order to stop Insas and Megapolitan exercising any rights over their shares. Five days later, it delivered

its written judgment on Ayer Molek's appeal. It called the situation produced by the High Court's treatment of the case 'an injustice perpetrated by a court of law'.

The Court of Appeal also strongly criticized Lingham for taking a commercial matter, the registration of shares, to a division of the High Court which should only deal with administrative law cases. It called him an 'unethical lawyer' and said that his conduct would give 'right-minded people the impression that some litigants are able to choose the judge before whom they wish to appear'. Insas and Megapolitan appealed to the Federal Court, Malaysia's highest court, which held a hearing on 1 August.

The Federal Court overturned the Court of Appeal's judgment and censured the lower court for its comments. In an 12 August judgment, it accused the Court of Appeal of itself 'bringing the administration of justice into disrepute' by 'departing from sobriety' and 'going off on a frolic of its own'. The Federal Court said that, by discontinuing the High Court action, Ayer Molek could 'be deemed to have conceded the ex parte order'. It expunged the sections of the Court of Appeal's judgment which criticized Lingham.

On 8 September, the share sales to Insas and Megapolitan, and PFA Nominees, were finally cancelled and police investigations into the whole affair ceased. All law suits were withdrawn a week later.

Something rotten

Although the Federal Court overturned the lower court's decision, the Court of Appeal's comments brought the Ayer Molek case to the attention of the rest of Malaysia's legal profession. One lawyer notes 'The Court of Appeal made it clear that it thought something funny had been going on in the High Court in that case. That was why they put in a Shakespeare quote about there being 'something rotten in the State of Denmark'. It was a reference to the building the High Court is in, which is called Denmark House'.

Tommy Thomas of Skrine and Co would like to know how Lingham managed to 'overcome two hurdles that are supposed to make it impossible for this misfiling to happen. First, you have to get the registry to admit the case in the wrong division. Then you have to persuade the judge himself to let it stay. The fact that the judge agreed to entertain this case really is a surprise'.

Another lawyer says: 'Lingham's action was like filing a commercial matter in the family court. It should have made him look incredibly stupid. But, of course, it turned out that it went super well.'

Yet another lawyer found the terms of the ex parte order that Lingham obtained highly irregular: 'First, it is literally unheard of to be given a compulsion order which forces a company to register your shares except where you have tried everything else and it is your last resort. Here, Insas and Megapelitan, the two shareholders, who had not done anything at all about their shares for six months, suddenly were able to go to court and use this last resort compulsion procedure. What I do not understand is how they could get a judge to threaten Ayer Molek with contempt of court before Ayer Molek had actually refused to do anything.'

Another says: 'At Lingham's request, this judge even added mandatory imprisonment to the ex parte order. And then he refused to hear Ayer Molek's case for two weeks or to suspend the order, although such orders only have a life-span of two weeks'.

Privileged Scheduling

There are various aspects of the way that the Federal Court dealt with Ayer Molek that also concern Malaysia's lawyers. 'The case made it into the Federal Court at a startling speed', says one. 'I am appealing the same sort of order at the moment. I expect that to get it into the Federal Court will take at least six months. In Ayer Molek, it only took Lingham four days.'

That sort of privileged scheduling, says Tommy Thomas, is usually preserved for emergency situations: 'In the textbooks, the example of an emergency situation they give is where a bulldozer is already outside your home ready to start knocking it down. You should not be able to get an expedited appeal in a case about shares.'

Other lawyers feel the tone of the Federal Court judgment, which was delivered on 12 August by Chief Justice Eusoff, and especially its criticisms of the Court of Appeal, are too personal. One says that, in the Ayer Molek judgment, Eusoff makes several departures from his established style of writing: 'Eusoff certainly has an identifiable style to his judgments, which, after all, we have been reading now since 1982, when he first became a judge. Normally, and unlike here, he writes in a very staccato form, using short sentences and without making many references to other cases as authorities. He certainly doesn't quote big chunks of text from other cases in the way that he did in this case. At least a quarter of this judgment was taken up with quotes from other cases. Normally it would be at most a couple of carefully chosen, very brief quotes, if a point needs to be made clear.'

The lawyer also points out that the judgment was written in the 11 days between 12 August 12, when the judgment was delivered, and the hearing on 1 August. 'My own experience', he says, 'is that it takes the Federal Court at least 21 to 30 days to produce a judgment'.

K Anantham of Skrine & Co says the Federal Court's decision to expunge parts of the Court of Appeal's judgment was fortuitous for Lingham: 'The Bar Council was going to order Lingham to account for his behaviour in Ayer Molek, using the Court of Appeal's comments about him as the basis, if necessary, on which to discipline him. But then, on the basis of an Indian authority which Lingham had found, the Federal Court expunged the important sections of the Court of Appeal's judgment, cutting the ground from under the Bar Council's feet.'

More concerns

In the aftermath of Ayer Molek, concerns about Lingham's tactics have arisen again. This time in the dispute between the Malaysia Borneo finance Holdings (MBfH) and the East Asiatic Company (EAC). Again, there were a number of procedural peculiarities which lead Param Cumuraswamy, United Nations Special Rapporteur on the Independence of Judges and Lawyers, to say that the case looks

like 'a very obvious, perhaps even glaring, example of judge-choosing', although he stresses that he has not finished his investigations.

This case concerned a claim for breach of contract for the sale of land. The land was bought from EAC on 8 March 1995 by MBfH. The cost was M$115m ($46m), paid for by 72,424,058 MBfH shares. A second agreement prevented EAC from selling the shares before 31 August, and gave three MBfH subsidiaries the right to arrange any sale once one was allowed.

On May 6, MBfH started an action in the Civil Division of the High Court, alleging EAC had broken its contract by not providing vacant possession of the land. Delays in the High Court meant the main trial could not be heard for at least six months, and so MBfH applied for a pre-trial injunction to stop EAC from selling the shares after August 31.

A hearing on MBfH's application took place in front of Judge Vohrah on June 21 and he later said that he would announce his decision on 23 August.

But, on 11 August, the subsidiaries, represented by Lingham, also started court proceedings against EAC, aimed at stopping EAC from selling the shares after 31 August. They issued an Originating Summons in Court No 5 of the Commercial Division of the High Court (Judge Malek), seeking a declaration that EAC's shares were 'encumbered by the dispute between MBfH and EAC'. The following day, the subsidiaries started a second, identical, set of proceedings against EAC in Court No 2 of the Commercial Division (Judge Low Hop Bing).

On 14 August, the Court No 2 proceedings were served on EAC. On the same day, the subsidiaries filed an ex parte notice of discontinuance of their Court No 5 proceedings.

EAC responded by filing two identical consolidation applications in Vohrah's and Low Hop's courts, requesting that the subsidiaries' action be added to the first action before Vohrah. At this point, Cheang and Ariff stepped down as MBfH's lawyers, to be replaced by TH Su & Co.

Low Hop Bing held a hearing on the consolidation application on 18 August. He granted EAC's request to adjourn the matter until after Vohrah's 23 August decision. Vohrah also held a hearing on the consolidation request and asked Lingham why the first proceedings he had started (in Court No 5) had been discontinued. This was the first EAC knew of the discontinued proceedings. Lingham replied that the Court No 5 summons was withdrawn 'because it had typing mistakes'.

On 23 August, Vohrah rejected MBfH's injunction application and, the following day, asked if any party objected to his hearing both cases. Only Lingham did, insisting that the subsidiaries' case should remain before Low Hop Bing. Vohrah then discharged himself from the main trial and instructed the parties to consult Judge Azmel Mamoor, Chief Judge of the High Court, on how they should proceed. Azmel said that they should talk to Chief Justice Eusoff. An hour after Vorhah's hearing, Low Hop Bing threw out EAC's consolidation request, announcing that the subsidiaries' case would remain before him.

After Eusoff informed the parties on 25 August that he could not see them until 6 September, the dispute was settled. The shares were sold on 30 August for M$115m.

Procedural gymnastics

Tommy Thomas, who acted for EAC, says that the 'procedural gymnastics' in which the subsidiaries engaged during that dispute 'raise questions that cry out for answers'. A lawyer close to Cheang & Ariff says that the firm stepped down because 'it disagreed with what was being done by the legal team working for the subsidiaires'.

Thomas points to the sequence of the two identical legal actions started in two different courts, one of which was then discontinued, as proof that the subsidiaries were trying to get their case before one particular judge, namely Judge Low Hop Bing: 'Lingham told Judge Vohrah on 19 August that the action they had started in Court No 5, on 11 August, had to be withdrawn on August 14 because of typing errors. That simply cannot be right. If you compare the main document from Court No 5, which is supposed to have contained so many typing errors that it had to be withdrawn, with the main document put into Court No 2 [Low Hop Bing's court], you will see that there are absolutely no differences between them. And there are only two inconsequential differences between the supporting affidavits'.

'The irresistible inference', Thomas says, 'has to be that they wanted Low Hop Bing, and only Low Hop Bing, to hear their case. When everyone else involved agreed that all the actions should be brought together in judge Vohrah's court, it was Lingham who insisted the subsidiaries' case should stay with Low Hop Bing'.

VK Lingham

The Malaysian Bar Council's record shows that Lingham qualified in 1988. Since then, according to Thomas, Lingham has built up 'a small portfolio' of clients, all of whom 'are incredibly rich and very loyal to him, mainly Malaysian entrepreneurs'.

So is it possible that the speculation surrounding these and others of Lingham's most recent cases could be a case of sour grapes? A few defeated opponents saving face by using their seniority to make mischief for him?

One member of the Bar Council rules this out: 'The people Lingham has been up against recently are all very senior counsel and have no need to indulge in such sour grapes. People like Tommy Thomas and Loh Siew Cheang of Cheang & Ariff have been around for many years and are from locally renowned firms. Their reputations are already absolutely assured. They are hardly people who would feel that they had somehow lost their credibility as advocates because of these cases.'

'Besides', he adds, 'I do not think these cases were ever really allowed to get to the meat of the dispute. So they never became about Lingham bettering any of his opponents in open argument before the court. The cases have all tended to finish immediately after the pre-trial stage. They were all about procedure and manoeuvring'.

VK Lingham declined to comment on the questions raised by these two decisions and those described below.

Terrible situation

The people who are most concerned about the implications of these recent cases are Malaysia's 5,500 lawyers. 'The present situation is terrible', says Thomas, 'one hears all sorts of gossip'.

Another senior lawyer, who prefers not to be named, agrees there is a new feeling around the profession. 'People are very disheartened and disillusioned', he says. 'There is a general feeling that Ayer Molek should not have happened the way that it did. In particular, people felt that, for some reason, in that case the Federal Court was choosing deliberately to be very unfair.'

And, according to this lawyer, Malaysian lawyers, bewildered by the many unusual aspects to these decisions, have found that they are faced with two equally unappetizing conclusions: 'Because no one understands these decisions, people have really had to start questioning both the intellectual capacity of our courts and the integrity of our judges.' Tommy Thomas says that many Malaysian lawyers have already decided which of those explanations they believe.

Economic consequences

The danger is that, if these perceptions continue and become more widely held, they could damage Malaysia's good standing in the eyes of foreign investors. An economist from one of the international banks which has offices in Malaysia is not sure if the affair has started to alter perceptions of the country. It is, he says, 'one of those intangible issues. It depends on the groundswell of opinion. At the moment I don't think any general opinion about Malaysia being corrupt has started to crystallize'.

According to the economist, those crucial foreign manufacturers like Malaysia for a number of reasons: 'Land has been well priced and the Malaysian government has always been very pro-foreigners. So it has allowed them to own the bulk of their own plants. Partly it is also because the English language is widely spoken, and there is a surplus of skilled labour in the market.'

But, and this is more important in the light of the new mood of gloom around Malaysia's courts, the economist thinks that company faith in Malaysia has 'a lot to do with Malaysia's UK-derived tradition of a good legal framework'. Especially as, he points out, setting up operations in a new country is a process often fraught with 'disputes and teething problems'.

So it would be cause for concern to those in the higher levels of Malaysian public life if the country's justice system had indeed started to go the way of its Asian neighbours. And there is evidence that, in the wake of these legal problems, Malaysian-based companies are beginning to lose faith in the Malaysian courts.

Param Cumuraswamy, who has a global mandate from the United Nations to investigate complaints such as those circulating in Malaysia at present, reports that

he has received enquiries about Malaysia from foreign businessmen. Originally a counsel at the Malaysian law firm of Shook Lin & Bok, he says: 'It would be unfair to name any names, but there is some concern about all this among foreign businessmen based in Malaysia, particularly among those who have litigation pending.'

Another senior Malaysian attorney has also witnessed this growing concern. 'There is a general concern among foreign clients about the civil justice system', he says. 'The first question that those clients ask me now is 'how safe are the Malaysian courts?' I know several people whose multinational clients have been asking them questions specifically about the Ayer Molek case.

There was no sign of these concerns at the beginning of 1995, when the World Economic Forum, a Geneva-based business consultancy, researched its World Competitiveness Report. It was published in September. As part of the research, major companies were asked what level of confidence they had in the justice system of the country in which they were located. On the basis of the 59 Malaysian replies it received between January and April, the World Economic Forum ranked Malaysia as one of the top 25 systems in the world, and placed it above both the US and United Kingdom.

Cumuraswamy thinks Malaysia would not be able to repeat that result at present. 'Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice,' he says. 'But I do not want any of the people involved to think I have yet made up my mind.'

The Tan libel case

Cumuraswamy says that, although these complaints 'only really came to prominence because of the judge-choosing allegations in the Ayer Molek affair, people first started to question the integrity of the judiciary after the M$10m ($4m) libel award which Vincent Tan received on 22 October last year.'

Tan is the head of the Berjaya Group, one of Malaysia's largest companies, which has diverse business interests ranging from gaming venues, to shopping malls, leisure resorts and telecommunications. An economist at one of the international banks based in Malaysia describes Tan as 'the archetypal business autocrat, completely inseparable from his company. Tan is the major stockholder in, and the driving force behind, the company. He goes out and gets the contracts, and hires and fires the staff'.

Tan sued over four articles published in the August and October 1993 issues of Malaysian Industry, a business magazine. The M$10m damages he received was the highest ever awarded by a Malaysian court. 'The Tan libel case struck people as unusual,' says Raphael Pura, 'because of the speed with which the case went from start to finish. Suddenly, a case which would typically take about four years to get a court date, was heard within six months. The trial itself, which normally would take about 12 months to get to court, was in and out in three days.'

A Malaysian lawyer agrees that the speed of the case raised eyebrows. 'People instantly wondered what was so special about the Tan libel case that the courts wanted to deal with it so speedily,' he says.

But others say it was the size of the award which made them curious. 'M$10 million dollars is a big award for a libel case by any country's standards. But, by Malaysian standards, it is a hell of a lot,' says Pura. 'No one in Malaysia had won anything like it before. The most previously had been about half a million Malaysian dollars. He adds that, at the outset, few had thought Tan's case looked strong: 'The core of the article was not a particularly outrageous reference to money-politics. Tan leapt on it and tried to put the worst possible meaning on it, one that perhaps wasn't justified.' VK Lingham acted for Tan in the case.

Defying the odds

According to one economist, one of Tan's companies, Berjaya Industrial, has also recently 'appeared to defy the odds' in a Malaysian court. On 13 May, Berjaya Industrial won an injunction in the High Court of Malaysia that prevented a M$500m dispute over derivatives from being relocated to the United Kingdom. Berjaya Industrial was suing CS First Boston for negligent misrepresentation after the Malaysian company lost heavily in an interest rates swap deal.

The economist at the Malaysian branch of an international bank says: 'From what I heard about the case, it should have been quite cut and dried. Berjaya basically ducked out. Tan later sacked the guy who signed Berjaya up for it. Locally the view was that that was a bit strange too. He seemed to be too junior a person to have committed the company to such a huge position. The Malaysian judge, Chief Judge Malek, said that it was a Malaysian deal so the dispute should be heard by a Malaysian courts.'

Tommy Thomas of Skrine & Co believes that the decision looks incorrect: 'It was an offshore deal done under UK law, so the UK seemed like it was the proper forum for the dispute.' CS First Boston and Berjaya settled the dispute on 12 October. Both agreed not to apply for any costs. VK Lingham acted for Berjaya Industrial.

Behind closed doors

Cumuraswamy stresses that the public fued that erupted between Chief Justice Eusoff Chin and the Bar Council over Ayer Molek appears to have been resolved: 'The Bar Council and the Chief Justice have met and I have heard that some positive steps are being taken to improve the system.'

But some of Malaysia's disheartened lawyers already think they know how it will feel if the system does not improve. One says: 'At the end of the day we all just want the system to be fair. You want it to be one where you are able to walk out of a case and say lightheartedly, "The judge was a fool!", without being worried that it could actually be true.'

He concludes: What people are really worried about is that one day it might be them who has to leave court without having any real idea what just happened. Whether it was they who never understood the law; whether it was the judge who misunderstood the law; or whether something terrible had been arranged in advance behind closed doors ...

The front page of the said issue of the Magazine consisted almost entirely of an illustration of a shady individual in a raincoat (intended to represent those accused in the said article, including the plaintiff, of corrupting the Malaysian judiciary), approaching a Malaysian High Court judge by pulling aside a part of the Malaysian flag, upon the whole of which illustration the plaintiff also relies.

[2] The plaintiffs had in para 8 of the statement of claim pleaded the natural and ordinary meanings of the said words complained of in the following terms:

The said words in their natural and ordinary meaning in the context in which they were published meant and were understood to mean that the plaintiffs and each of them had connived at, and participated in the corruption, or the attempted corruption by Dato' VK Lingam of the Malaysian judiciary, in the course of the plaintiffs litigation against the Ayer Molek Rubber Company Berhad in Malaysia.

[3] On publication of the said article, the plaintiffs took umbrage at its contents as they considered it to be highly defamatory of and concerning them. On 18 December 1995, the plaintiffs solictors issued a letter of demand in identical terms to all the defendants and concluded as follows:

In circumstances, our clients have no choice but to issue proceedings for defamation, in order to vindicate their business and commercial reputations which is worldwide. It is important to them that all steps are taken, for the purpose of mitigating the continuing damage being done, as quickly and effectively as possible.

We therefore write to ask that you will agree:

(1) to join in the making of a Statement in Open Court in agreed terms;

(2) to publish a full and unqualified retraction in the International Commercial Litigation magazine, with corresponding prominence to that of the offending article, in terms to be agreed by us on behalf of our clients;

(3) to make suitable proposals for the payment of damages to vindicate, so far as is now possible, the companies' reputations;

(4) to undertake to refrain from publishing any similar libels in the future.

Naturally, our clients will also expect to be indemnified in respect of all the legal costs which they have had to incur. Will you please reply to this letter as a matter of urgency. In the meantime all rights are reserved.

[4] Joff Wild, the second defendant replied to the plaintiffs solicitors on 21 December 1995 in the following terms:

Dear Sirs

International Commercial Litigation

We are looking into the matters which you raised in your letter of 18 December 1995.

We shall write substantively in reply in the course of the next few days.

[5] The defendants, solicitors Mishcon De Reya based in London replied to the plaintiffs solicitors on 15 January 1996 in the following terms:

> Dear Sirs
>
> EUROMQNEY PUBLICATIONS PLC
>
> We act for Euromoney Publications Pic and its editor. They have passed us your three letters dated 18 December 1995. It is convenient to deal with all three letters together. We trust you have no objection.
>
> The article was a well researched piece on a subject of considerable international importance. The judgment of the Court of Appeal in the Ayer Molek and the subsequent decision on the Federal Court were both extraordinary events meriting and receiving much press attention and scrutiny.
>
> In your letters you make much of small passages of the article, ignoring the meaning as a whole and other significant passages. For instance, no mention is made of Mr Lingam's ability to bypass procedural rules and the remarks of other Malaysian lawyers quoted. In particular, we refer to the remarks of Mr Cumuraswamy, the United Nations Special Rapporteur for the independence of judges and lawyers. He comments (although he has yet to reach his final conclusions) that the case looks like 'a very obvious, perhaps even glaring example of judge choosing'. The article does no more than set out the facts supporting this statement.
>
> In the circumstances, we are instructed to defend any proceedings you commence.
>
> Nevertheless, if you are able to provide substantially more information relating to your clients' complaints our clients will consider the possibility of giving your clients the opportunity to reply in the next issue of International Commercial Litigation.
>
> Yours faithfully
>
> MISHCON DE REYA

[6] It is important to note that the defendants' solicitors had gone on record in their letter of reply dated 15 January 1996 to state:

> In the circumstances, we are instructed to defend any proceedings you commence.

[7] In the light of the clear position and stand taken by the defendants to defend any proceedings to be commenced by the plaintiffs, the plaintiffs issued a writ for libel against the defendants on 19 August 1996. The first plaintiff claimed against the defendants damages of RM25m including exemplary damages for libel contained in the said article. The second plaintiff claimed against the defendants damages of RM25m including exemplary damages for libel contained in the said article.

[8] Despite the fact that the defendants had through their solicitors Mishcon De Reya gone on record to state that they would defend any

proceedings commenced by the plaintiffs, the defendants have not submitted to the jurisdiction of this honourable court. Thus, they have not entered appearance to the plaintiffs' action.

[9] The plaintiffs set the matter for trial rather then entering interlocutory judgment against the defendants and proceeding for assessment of damages. The plaintiffs were entitled in law to take this course of action. There is authority for this position taken by the plaintiffs. In the case of *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun and other appeals* [1995] 2 MLJ 493 at p 511, the Court of Appeal held as follows:

> Faced with the first appellant's default in delivering a pleading, the respondent had a choice. He could have entered interlocutory judgment and moved for an assessment of his damages. Alternatively, he could have set the action down for trial. He chose the latter course. In this he is supported by authority ...
>
> In my judgment, a plaintiff in a libel action is not bound to enter default judgment. I certainly see no such compulsion in the language of O 19 r 7 of the Rules of the High Court 1980. He is entitled to proceed and to set the action down for hearing for the purpose of vindicating his reputation and to have his damages assessed. I do not think that it lies in the mouth of a defendant who has publicly assailed a person's character to suggest that vindication ought not to be properly obtained.

[10] The plaintiffs had proceeded to set the matter down for hearing for the purpose of vindicating their reputation and to have their damages assessed.

WHAT THE PLAINTIFFS MUST PROVE

[11] In a defamation action, the plaintiffs must prove that the words complained of are defamatory of and concerning the plaintiffs, that the said words refer to the plaintiffs, and that the said words have been published to a third person. The burden is upon the plaintiffs to prove these three essential ingredients of the action.

[12] There are certain presumptions made in favour of the plaintiffs. First, it is presumed that the words complained of are untrue. Secondly, in all actions for libel, it is presumed that damage has been caused to the plaintiffs.

[13] In *Carter-Ruck On Libel And Slander* By Peter F Carter-Ruck And Harvey NA Starte (5th Ed, 1997 Butterworths) at p 35, it is clearly stated as follows:

> In any action for defamation, whether it be for libel or slander, the plaintiff must prove that the matter complained of:
>
> (1) is defamatory (defamation)
>
> (2) refers to the plaintiff (identification)

(3) has been published to a third person (publication)

The burden is upon the plaintiff to prove these three essential ingredients and if he cannot do so his action is bound to fail.

These being the only essentials to found an action for defamation it follows that certain presumptions are made in favour of the plaintiff. Two such presumptions which are of great practical importance are that it is presumed in all actions for defamation that the matter complained of is untrue, and it is presumed in all actions for libel, and in those actions for slander which are said to be actionable per se, that damage has been caused to the plaintiff. This means that the entire burden of proving that the matter complained of is true or that it has not caused the plaintiff damage is generally on the defendant.

PROOF OF PUBLICATION

[14] The plaintiffs had submitted to this honourable court an original copy of the said magazine which carried the said article. Secondly, the plaintiffs' second witness (PW2), Thavalingam a/l Thavarajah, an advocate and solicitor and who was at the material time a senior legal assistant in the law firm of Messrs Shearn Delamore & Co confirmed that he received a circular sent by Dato' Ronald Khoo Teng Swee in which the article complained of was attached. The circular dated 26 December 1996 was sent by Dato' Ronald Khoo, the then Senior Partner of Messrs Shearn Delamore & Co to all partners, all senior legal assistants and all assistants. Mr Thavalingam confirmed that he had seen the said article attached to the said circular and that he had also read the said article sometime in December 1995.

[15] PW2 also confirmed that Messrs Shearn Delamore & Co then subscribed to the said magazine. Further, the said magazine was then placed in the library of Messrs Shearn Delamore & Co. PW2 also confirmed that he had read the said article complained of some time in December 1995. He also testified that he was attracted to read the article because of the headlines of the said article.

[16] The plaintiffs' fourth witness (PW4), N Sivabalah Nadarajah an advocate & solicitor and a partner in the legal firm of Messrs Shearn Delamore & Co had similarly received a copy of the article complained of together with the circular sent by the same Dato' Ronald Khoo. PW4 further confirmed that Messrs Shearn Delamore & Co was then a subscriber to the said magazine. PW4 had confirmed in his evidence that he had read the said article sometime at the end of November 1995. He was in fact shown a copy of the said article before the circular by Dato' Ronald Khoo was shown to him. PW4 then informed Dato' VK Lingam in early December 1995 about the said article. The subject matter of the said article attracted PW4's attention and he read the said article.

[17] Norlin bte Shamsulbahri (PW5), the then librarian at Messrs Shearn Delamore & Co also testified in court and confirmed that Messrs Shearn Delamore & Co subscribed to the said magazine. PW5 also testified that the lawyers of Shearn Delamore have access to the law library and also have access to the said magazine. The users of the law library were allowed to photocopy the said magazine and any article in the said magazine.

[18] I find that the plaintiffs had proven that the words complained of were published to third parties as required by the law of defamation. The above to my mind, is sufficient to prove the publication of the said libel.

[19] In *Gatley On Libel And Slander* (10th Ed, 2004) at pp 961–962, it is stated as follows:

> PROOF OF PUBLICATION
>
> Production of document. What is required is evidence that the defamatory statement was communicated by or on behalf of the defendant to persons other than the claimant. In cases of libel this usually presents little difficulty. Production of the document containing the statement will in many cases be sufficient evidence. Thus where the statement is in a newspaper, production of a copy of the paper will generally be accepted as prima facie evidence of publication by the journalist named in the byline, and by the editor, publishers and printers of the newspaper, production of a copy of a book would provide evidence of publication by the named author and publishers of the book of a defamatory statement contained in the book.

IDENTITY OF THE PLAINTIFF

[20] As to the second element that the said words complained of refer to the plaintiffs' identification, I find that the names of the first plaintiff and the second plaintiff are clearly stated in the said article. Therefore, the second element of the identity of the plaintiffs has been established.

WHETHER THE SAID WORDS ARE DEFAMATORY OF THE PLAINTIFFS

[21] The plaintiffs have to establish that the said words complained of are defamatory of and concern the plaintiffs. This therefore calls for the consideration of the 'natural and ordinary meaning' of the said words complained of. The 'natural and ordinary meaning' of words in the law of defamation has been repeatedly expounded in numerous cases. It is suffice to quote the following cases. In the recent Privy Council case of *Bonnick v Morris* [2002] 3 WLR 820 at p 824, Lord Nicholls of Birkenhead succinctly defined the approach to be adopted by the Court in the following terms:

> As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in *Skuse v*

Granada Television Ltd [1996] EMLR 278 at pp 285–287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the Sunday Gleaner, reading the article once. The ordinary, reasonable reader in not naive; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant. An appellate court should not disturb the trial judge's conclusion unless satisfied he was wrong.

[22] In *Gillick v British Broadcasting Corporation & Anor* [1996] EMLR 267 at p 272 Lord Justice Neill after referring to *Skuse v Granada Television Ltd* [1996] EMLR 278 held as follows:

I can summarise the relevant principles as follows:

(1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer watching the programme once.

(2) The hypothetical reasonable reader (or viewer) is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

(3) While limiting its attention to what the defendant has actually said or written the court should be cautious of an over-elaborate analysis of the material in issue.

(4) A television audience would not give the programme the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.

(5) In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable viewer the court are entitled (if not bound) to have regard to the impression it made on them.

(6) The court should not be too literal in its approach.

(7) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally.

[23] In the leading House of Lords case of *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at pp 258–259, Lord Reid in his widely quoted speech explained the 'natural and ordinary meaning of words' in the following passages:

There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The

ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs ...

What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning ...

Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question.

[24] In the same case, Lord Devlin held at p 277 as follows:

Lords, the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.

[25] In the case of *Jones v Skelton* [1963] 3 All ER 952, the Privy Council held at p 958 as follows:

The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph, Ltd*). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words.

[26] In the case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at pp 374–375, the Court of Appeal held, per Dato' Gopal Sri Ram JCA as follows:

It cannot, I think, be doubted that the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published. …

A …

> Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for a court to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent upon the circumstances of the particular case. In England, libel actions are tried by judge and jury and the question is left for the jury to determine. However, in this country, libel actions are tried by a judge alone, he is the sole arbiter of questions of law as well as questions of fact. He must, therefore, make the determination.

[27] Applying the above test and bearing in mind that the ordinary reasonable reader is not naive, and that he can read between the lines, but that he is not unduly suspicious and that he is not avid for scandal, and reading the article as a whole once, the said article is clearly defamatory of and concerning the plaintiffs. The said words complained of bore the natural and ordinary meaning pleaded by the plaintiffs in para 8 of the statement of claim that the plaintiffs and each of them had connived at, and participated in the corruption, or the attempted corruption by Dato' VK Lingam of the Malaysian Judiciary, in the course of the plaintiffs' litigation against the Ayer Molek Rubber Company Bhd in Malaysia.

[28] The defamatory allegations contained in the said article and published by the defendants are false and untrue. The defendants allege in the fourth para at p 10 of the said article that:

> The ultimate fear about Ayer Molek and all of these cases is that they mean Malaysia is going the way of other Asian countries, such as Indonesia, Thailand and the Philippines, says Raphael Pura, the Malaysia correspondent to the *Asian Wall Street Journal*. The implication is that, just like those other countries, Malaysia is becoming a place where justice is now up for bid.

[29] PW1, Wong Gian Kui, the Executive Director of the first plaintiff testified that the defamatory and outrageous allegations relating to Ayer Molek case as contained in the said article are wholly untrue, false and without any basis whatsoever. PW7 Dato' VK Lingam testified in Court that the defamatory and outrageous allegations relating to Ayer Molek case as contained in the said article are wholly untrue, false and without any basis whatsoever.

[30] It must be noted that the offending remarks and comments made by the Court of Appeal in the Ayer Molek case have been expunged by the Federal Court in the case of *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors* [1995] 2 MLJ 833 at pp 841–842.

I DAMAGES

[31] The plaintiffs had pleaded in para 9 of the statement of claim that:

By reason of the publication of the said words the plaintiffs' trading reputations have been seriously damaged and they have been brought into public scandal, odium and contempt.

[32] PW1, Wong Gian Kui, the Executive Director had also testified that the defamatory allegations made against the plaintiffs would irreparably affect the plaintiffs business and trading reputations. The said article was photostated and widely circulated to many lawyers, bankers and businessmen.

[33] The plaintiffs have also pleaded in para 10 of the statement of claim the facts and matters in support of their claim for exemplary damages. In particular paras 10(1), 10(4) to 10(6) are as follows:

MD the allegations complained of were self-evidently of the most serious and damaging nature; ...

(4) The defendants however deliberately chose to make the allegations, destructive as they were of the plaintiffs' business reputations, the cover story for the Magazine, highlighted and illustrated on the front page as aforesaid, for the entirely improper motive of enchancing their individual and collective reputations for publishing hardhitting and controversial stories; and so that they would attract more readers or potential readers to the Magazine;

(5) in relation to the attraction of potential readers, the plaintiffs will rely in particular on the fact that the defendants were at all material times aware that the Magazine, because of its nature and distribution was made available and likely to be made available to potential subscribers on an unlimited and continuing basis; and on the fact that in the pages directly following the article complained of was a 'publishers insert', containing an introductory offer to new subscribers;

(6) In the premises, the defendants and each of them published the words complained of having calculated that they stood to gain more, whether as journalists, editors, publishers, or otherwise by the publication of such sensational allegations, namely by enhancing their reputations as aforesaid, and by increasing the Magazine's readership, than they would lose if successfully sued by the plaintiffs for libel.

[34] It is my judgment that the said magazine and the defendants do not enjoy any special position in the law of libel. This was made clear by the Court of Appeal in the case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 375 where his Lordship Dato' Gopal Sri Ram JCA held that:

The fact that the respondent is a newspaper does not in my judgment place it in any special position in the law of libel. As Lord Shaw said in *Langlands v Leng* (1916) SC (HL) 102 at p 110: 'VA newspaper has the right, and no greater or higher right, to make comment upon a public officer or person occupying a situation than an ordinary citizen would have.' Indeed, by reason of their capability to formulate and influence public opinion, those having control over the dissemination of news or views, whether by means of the print or electronic media, should act responsibly. Where publication is said to be factual, they must

ensure that the facts they make available to their readers, listeners or viewers are true.

[35] In awarding damages for libel to companies like the plaintiffs, it is essential to take into account the following passage by Lord Reid in the leading House of Lords case of *Rubber Improvement Ltd v Daily Telegraph Ltd* [1963] 2 WLR 1063 at p 1071:

> Let me take first the case of the plaintiff company. A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured.

[36] The plaintiffs have instituted this libel action to vindicate their business and trading reputation. As pointed out by Lord Radcliffe in *Dingle v Associated Newspapers Ltd & Ors* [1964] AC 371 at p 396:

> A libel action is fundamentally an action to vindicate a man's reputation on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as the demonstrative mark of that vindication.

[37] In the law of defamation it is presumed that some damage will flow from the libel and the plaintiffs need not prove actual damage. *Gatley on Libel and Slander* (10th Ed, 2004) para 32.45 reads as follows:

> Damage presumed. In case of libel or slander actionable per se, the claimant need not prove actual damage, for:
>
> > 'the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation.'
>
> There is no obligation on the plaintiffs to show that they have suffered actual damage ... In every case (a plaintiff) is entitled to say that there has been a serious libel upon him, that the law assumes he must have suffered damage, and that he is entitled to substantial damages.
>
> However, it is probably improper for the claimant to state his intention to donate any sum he receives in damages to charity.

[38] It must also be recognised that the plaintiffs must be able to point to a sum awarded by this honourable court as sufficient to convince a bystander of the baselessness of the charges made by the defendants against the plaintiffs. Lord Hailsham LC in *Cassell & Co v Broome* [1972] AC 1027 at p 1071 held that:

> ... in case the libel, driven underground, emerges from its lurking place at some future date, [the plaintiff] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge...
>
> Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the

reaffirmation of the truth of the matters complained of, or the malice of the defendant. A

[39] Further Lord Radcliffe had stated in *Associated Newspapers v Dingle* [1964] AC 371 at p 399 that:

… the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it [the libel] has done or the hurt it has caused ... B

[40] Again in *Manning et al v Hill* [1995] 126 DLR (4th) 129 at p 176, the Supreme Court of Canada comprising of seven judges held that:

A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation. It is members of the community in which the defamed person lives who will be best able to assess the damages. C

[41] In the case of *Datuk Harris bin Mohamed Salleh v Abdul Jalil bin Ahmad & Anor* [1984] 1 MLJ 97 at p 98, Siti Norma Yaakob (as her Ladyship then was) (now FCJ) said as follows: D

The principles governing the assessment of damages in actions of this nature are clearly spelt out by *Gatley on Libel and Slander* (7th Ed) at para 1358. The assessment does not depend on any legal rule but the following factors should be considered: (1) The conduct of the plaintiff (2) his position and standing (3) the nature of the libel (4) the mode and extent of publication (5) the absence or refusal of any retraction or apology and (6) the whole conduct of the defendant from the time the libel was published down to the very moment of the verdict. E

From these principles, it is clear that the task of assessing damages is to approach it broadly, the amount of damages to be awarded will depend on the circumstances of each case. In *Broome v Cassell and Co Ltd*, Lord Hailsham gave the following guidelines. Quite obviously the award must include factors for injury to the feelings, to the anxiety and uncertainty undergone in the litigation, the absence of apology or the reaffirritation of the truth of the matters complained of or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel or where perhaps he has libelled the defendant in reply. F G

[42] The principles set out in the case of *Datuk Harris* above have been adopted with approval by the Court of Appeal in the case of *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161 at p 180. The Court of Appeal had held in *Karpal Singh*'s case as follows: H

Damages

I shall now come to the damages. The learned trial judge had awarded the respondent as against the appellant a total of RM500,000 in damages. Before us it was argued by the appellant that it was excessive. I

The principles governing the assessment of damages in libel cases have remained unchanged over the years and need no repetition. (For statements of the principles to be applied in assessment of damages in defamation cases, see, inter alia, *Datuk Harris bin Mohd Salleh v Abdul Jalil bin Ahmad* [1984] 1 MLJ 97, *Dato' Musa bin Hitam v SH Alatas & Ors* [1991] 1 CLJ 314, *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun and other appeals* [1995] 2 MLJ 493, *Ling Wah Press (M) Sdn Bhd v Ors v Tan Sri Dato' Vincent Tan Chee Yioun* [2000] 4 MLJ 77 and *Liew Yew Tiam & Ors v Cheah Cheng Hoe & Ors* [2001] 2 CLJ 385. It is the amount awarded that has drastically changed over the last five or six years. Therefore, before considering the amount awarded by the learned trial judge, it is important to look at the trend of awards of damages given by the courts in this country. Of course, it must be borne in mind that each case is decided on its own facts and circumstances.

[43] In *Baltrop v Canadian Broadcasting Corp* [1978] 86 DLR (3d) 61 (NSSC App Div) at p 76 it was held:

> The Courts have frequently allowed very large sums as damages where widely published defamation has seriously slurred a fine reputation, even where no loss could actually have been suffered, financially or otherwise.

[44] And at p 79, it was further held that:

> Serious damage to reputation requires heavy compensation, even if no specific loss is or can be shown. Here, a man of international reputation is vilified in the eyes of his professional confreres. He thus suffers greatly, though he may not lose a single dollar.

[45] In the case of *Broome v Cassell & Co* [1972] AC 1027 at p 1063 held as follows:

> I think that the inescapable conclusion to be drawn from these authorities is that only one sum can be awarded by way of exemplary damages where the plaintiff elects to sue more than one defendant in the same action in respect of the same publication, and that this sum must represent the highest common factor, that is, the lowest sum for which any of the defendants can be held liable on this score. Although we were concerned with exemplary damages, I would think that the same principle applies generally and in particular to aggravated damages, and that dicta or apparent dicta to the contrary can be disregarded. As counsel conceded, however, plaintiffs who wish to differentiate between the defendants can do so in various ways, for example, by electing to sue the more guilty only, by commencing separate proceedings against each and then consolidating, or, in the case of a book or newspaper article, by suing separately in the same proceedings for the publication of the manuscript to the publisher by the author. Defendants, of course, have their ordinary contractual or statutory remedies for contribution or indemnity so far as they may be applicable to the facts of a particular case. But these may be inapplicable to exemplary damages.

[46] The plaintiffs had adduced evidence as to the background and circulation of the said magazine. The document on the 'Background to International Commercial Litigation' states as follows:

> International Commercial Litigation was launched in June 1995 as a specialist publication serving the interests of commercial litigators worldwide.
>
> In its relatively short history, it has consistently increased its circulation month on month and has a worldwide readership of 9000.
>
> This includes in-house counsel from FT500 and. Fortune 500 corporations, and the top 250 leading counsel for the US, Europe and Asia. International Commercial Litigation is available by subscription for only $250 per annum.
>
> International Commercial Litigation provides private practitioners and in-house counsel with all the latest news and developments in litigation and dispute resolution from around the world.

[47] Having regard to the established principles of law applicable in the award of damages in libel actions and the relevant factors stated above and taking into account the grave and serious libel perpetrated by the defendants against the plaintiffs and to vindicate the plaintiffs' business and trading reputation and to nail the falsity of the scurrilous allegations made against the plaintiffs by the defendants, and bearing in mind the guideline given by the Court of Appeal not to award large and extensive awards I am of the view that a sum of RM500,000 for each of the plaintiffs would be sufficient compensation. I also award interest at 4%pa to run from the date of publication to date of judgment and costs.

Plaintiffs' claim allowed.

Reported by Sugandra Rao